United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1203

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

PETER DAILY,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Statutes Cited:

Title 18, United States Code:

Rules Cited:

Federal Rules of Criminal Procedure

Other Authority:

I STATEMENT OF ISSUES PRESENTED FOR REVIEW

a. Was the defendant denied a fair trial by the conduct of the prosecution?

b. Was the defendant denied due process of law by the failure to ascertain his competency to stand trial?

c. Was the defendant denied a fair trial because of inadequate and ineffective assistance of counsel?

II STATEMENT OF THE CASE

a. The Course of Proceedings

On March 8, 1974 a ten count indictment (74 CR 229) was filed in United States District Court, Southern District of New York, charging Joseph Novoa, Peter Daly, Frank Ramos, Demetrios Papadakis, Joaquin Nieves, and Elissa Poussas with the crimes of conspiracy to obstruct and hinder the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs, Bureau of Customs, in investigating and prosecuting narcotics violations (Novoa and Daly); accessory after the fact (Novoa and Daly); obstruction of justice (Novoa and Daly); conspiracy to violate the narcotics law (all defendants); violation of the narcotics laws, by receiving five kilograms of heroin and cocaine (Novoa and Daly); 2 counts of violation of the nar-

cotics laws by receiving one kilogram of heroin in May and June 1970 (Novoa, Daly, Ramos, Papadakis, Poussas); violation of the narcotics laws by receiving one kilogram of heroin in or about May and June of 1970 (Novoa, Daly, Ramos and Nieves) and 2 counts of violation of the narcotics law by receiving one kilogram of cocaine in or about May and June of 1970 (Novoa, Daly and Ramos). (Appendix at 11a).

The trial by jury, before Hon. Inzer B. Wyatt, U.S.D.J., was commenced against Novoa, Papadakis and Nieves on May 15, 1974; it ended in the convictions of Novoa and Papadakis. Those convictions were affirmed by this Court sub nom. United States v. Papadakis, 510 F.2d 287 (2d Cir.), cert. denied, 421 U.S. 950 (1975). Poussas and Daly were not within the jurisdiction, and Ramos pled guilty. In December of 1974 Daly was arrested in England and extradicted on four substantive counts, arriving in the United States District Court on May 13, 1975. Daly was remanded in lieu of posting $100,000 bail.

Daly's trial commenced on June 2, 1975 and he was convicted on all counts. On August 22, 1975 Daly was sentenced to imprisonment for a term of ten years on each count, to run concurrently with each other. (Appendix at 25a).

b. Statement of the Relevant Facts

As noted, the trial of the defendant-appellant Peter Daly concluded the Government's prosecution under the instant indictment.

The evidence adduced by the Government in the second trial, against Daly alone, was necessarily similar to that presented in Papadakis, supra. However, the absence of certain charges in Daly's trial, differences in the testimony and proof submitted and the particular defendant involved, provide, it is submitted, a new framework in which to consider and review Daly's conviction.

The primary witnesses against Daly were Carlos Aquilez, Sal Bouteriera and Frank Ramos.

Aquilez, a New York City Police Officer, and Daly's former partner in the Department's Special Investtigations Unit, testified that in all his tenure in S.I.U. Narcotics, he had never signed a completely true affidavit in a court proceeding. He lied, also under oath, to the Knapp Commission and to the State of New York Investigative Commission. (Appendix at 75a-79a). While assigned to S.I.U. he had never testified truthfully before a Grand Jury (Appendix at 85a). He pled guilty to a charge

of perjury in the Southern District.

Frank Ramos was a part owner of a restaurant and a narcotics dealer. He had previously been tried twice on an unrelated drug charge, testifying falsely at both trials. (Appendix at 88a). He was also Aguilez's informant, receiving drugs and money in payment. (Appendix at 81a). Aguilez's perjury conviction was founded in his false testimony before the Grand Jury relative to his relationship with Ramos (Appendix at 80a).

Bouteriera was Aguilez's brother-in-law. He had originally urged Ramos not to co-operate with the Government after Ramos' arrest; he urged Ramos on many occasions, approaching him in order to convince him to "fight" the case. (Appendix at 94a-99a).

Principally upon the testimony of these three witnesses rests the Government's case. Some corroboration for some of this testimony came from a former S.I.U. Sergeant, Gabriel Stefania; John Kidd, a police officer assigned to the lock and pick squad; and a building superintendent, James Sheridan.

b. The 100-Kilo Case

Aguilez outlined the Government's 100-kilo case to the jury. He testified that on April 14, 1970, he, Novoa, and Daly were surveilling a cafe in Manhattan in their capacity as narcotic agents

when a car drove up containing 3 males and a female. Two of the men approached the cafe and tapped on a window. A person "vaguely known" to Aguilez as a narcotic dealer spoke to the men, who thereafter re-entered the car and drove away. (Appendix at 44a-45a).

The agents then followed the car all the way to New Jersey, finally stopping it to ask for identification and in order to search the trunk. (Appendix at 46a). The four occupants of the car, speaking in Spanish, which Daly did not speak nor understand (Appendix at 47a-48a; 118a), stated that they were respectable people, and would show the police where they lived. All seven then returned to New York, Novoa and Aguilez riding in the car with the four suspects, and Daly following in his own car. (Appendix at 47a). After riding around Manhattan for a while, Aguilez decided to arrest the four based on the possession by one of them, Gonzalez, of apparently forged passports. When asked for identification, Gonzalez had produced 3 passports in different names. (Appendix at 49a). Aguilez testified that he had expressed to the other officers his apprehension, lest the arrests he deemed illegal. (Appendix at 49a). Daly, according to Aguilez, at this point winked, and told Aguilez that he thought they had a gun in the car. (Appendix at 50a). The prisoners were transported to the precinct, where, with the three men in the pen and the woman seated outside, the officers examined the personal effects of their prisoners. This included various pieces of paper and 15-30 keys. (Appendix at 51a, 54a).

Gonzalez, in Spanish, shouted to Aguilez that he had been robbed of $100. (Appendix at 52a). The money had, in fact,

been taken by Aguilez, but he became indignant at the accusation, and allowed Gonzalez to come out of the cell to locate the money (Appendix at 52a). Gonzalez ran to the table on which the papers were placed and swallowed a piece of paper. Meanwhile, the woman approached the table and ripped up some papers. (Appendix at 53a). Order was restored to the precinct, and Aguilez overheard Gonzalez say in Spanish, "The cargo is safe." (Id.) Novoa and Aguilez were able to ascertain that the destroyed papers were rent receipts from an apartment. After telephoning their superior, Lieutenant Egan, Aguilez testified that he and Daly took the keys and went to the apartment. They were able to gain admittance, but were unable to open two closets. A call was placed to Novoa to obtain the services of a lock man. (Appendix at 57a). Aguilez testified that Kidd arrived and was able to open the 2 closets. Therein was found, stacked floor to ceiling, packages of heroin and cocaine. (Appendix at 58a-61a).

Aguilez, Daly and Kidd began to remove the packages from the closet, and stacked, counted and placed them in suitcases found in the apartment. (Append at 62a,102a). Aguilez said that Daly put 5 kilo packages in a brown suitcase, telling Aguilez he wanted to keep it for "flaking" purposes. (Appendix at 63a). Aguilez agreed, and Daly left to put the suitcase in his trunk. (Appendix at 63a-65a). Kidd, present at all times, did not see Daly leave, did not think a suitcase was missing and did not see any packages being placed in a separate suitcase. (Appendix at 103a-106a).

A week later, Aguilez testified that he asked Daly for the

suitcase, which was then transferred to his car. (Appendix at 66a). About a month after the transfer, Aguilez, Novoa, and Daly decided to sell the drugs, using Aguilez's brother-in-law, Bouteriera, as their conduit. (Appendix at 67a-68a). Aguilez contacted Bouteriera, who agreed to sell the drugs, even though he had allegedly never even seen drugs before. (Appendix at69a; 90a). The suitcase was brought to Bouteriera's home after he agreed to sell it.

Bouteriera contacted Frank Ramos, (Appendix at 89a) who agreed to attempt to find buyers for the narcotics. Ramos,who did not know Daly, was provided with samples by Bouteriera after Bouteriera consulted with Aguilez. (Appendix at 91a).Ramos sold a kilo of cocaine to "Jimmy the Greek" (Appendix at 86a-87a). The proceeds of this sale and two others were allegedly divided among Aguilez, Novoa and Daly.

Daly was arrested in England. Two British policemen who had accompanied him from Liverpool to London testified that Daly indicated that he knew the charges against him, prior to being told what they were; that he had been informed about the Novoa trial and conviction; that he told the English magistrate that he would return to Ireland, from where he couldn't be extradicted, if released on bail; and that at the time of arrest, he had in his possession an autobiographical treatment or resume. (Appendix at 110a-117a).

On May 13, 1975, Daly appeared before Hon. Inzer B. Wyatt, U.S.D.J. with John P. Schofield, as attorney. Trial was set for June 2, 1975. On May 27, 1975 all parties appeared before the Court at the request of the U.S. Attorney to discuss the Government's

motion to disqualify Mr. Schofield on the grounds that he had previously represented a Government witness. The motion was denied. (Appendix at 37a-38a). However, Mr. Schofield thereafter withdrew from active participation and brought in Victor Herwitz, Esq., as trial counsel. Further discussion of these facts will be found in Point III, infra.

b. Other Acts

The issue of the admissibility of other alleged acts of Daly arose prior to the calling of the first witness. (Appendix at 41a). The trial court, in an effort to correctly apply this Court's ruling as set forth in United States v. Papadakis, supra, and to prevent undue prejudice to the defendant, made rulings as to the admissibility of this evidence based on representations by the prosecution. The nature of the evidence, the claims of the Assistant U.S. Attorney, and the resultant issues will be fully discussed in Point Ib, infra.

III. POINT I: DEFENDANT WAS DENIED A FAIR TRIAL BY THE CONDUCT OF THE PROSECUTOR.

a. Unfair bolstering

The Government presented the testimony of a convicted

perjurer (Aguilez), and admitted perjurer (Ramos), and an admitted suborner of perjury (Bouterie[illegible], all acknowledged drug dealers. It was crucial that the jury accept their testimony. The prosecution was obviously well aware of the fact that these witnesses' credibility was surely questionable, at best. He therefore chose to bolster the testimony of his witnesses by putting the credibility of the United States Government behind his case, in contravention of the teachings of United States v. Puco, 436 F.2d 761, 762 (2d Cir. 1971).

It has often been urged upon this Court that the prosecutor has improperly used his office to establish the credibility of his witnesses. The prosecutor has also been accused of injecting his own credibility into the proceedings, and thereby guilty of placing "the prestige of the United States Attorney's office behind the government's case." United States v. Brawer, 482 F.2d 117 (2d Cir.), cert. denied, 419 U.S. 1051 (1973). These tactics have been repeatedly denounced by the Court, and admonishments, indeed warnings, have been given to the Government's prosecutors, United States v. Briggs, 457 F.2d 908 (2d Cir.), cert. denied, 409 U.S. 986 (1972) and cases cited therein. This Court, however, has been reluctant to overturn convictions on this ground, usually because provocation has been found for the remarks of the Government in the summation of defense counsel. United States v. La Sorsa, 480 F.2d 522 (2d Cir), cert. denied, 414 U.S. 855 (1973). United States v. Briggs, supra.

The summation delivered by the prosecutor in this case not

only belies the justification of provocation, usually presented to this Court by the Government, but reaches new levels of abuse. This case was tried pursuant to Federal Rules Criminal Procedure 29.1, which requires the prosecution to sum up first. Therefore, the prosecutor established the tone of his arguments, by stating:

> "...If Aguilez and Bouteriera are conspirators, the Government has to be a co-conspirator, because we put them on the stand. And if you believe for one minute that we made up a story, put on witnesses and conjured up the evidence just to convict this defendant, then when the judge gets done giving you the law, you don't have to get up at all, you don't have to deliberate for two seconds, but if you believe that you just sit right there and have Madame Forelady get up and say, "We find him not guilty," because we told you in the beginning the Government wants a fair trial for him and for the public, nothing more, nothing less."

The Assistant United States Attorney told the jury that finding the Government witnesses lied entails finding that the Government is a liar. Not content with this, however, the prosecutor continued:

> "You might also consider in this regard how if a conspiracy is there, you will recall that Bouteriera and Ramos were sentenced by a Judge of this Court. Is he supposed to be a co-conspirator also? Is he supposed to be in on this too? "
>
> (Appendix at 124a-125).

The triers of the facts were told by the U.S.

Attorney that in order to find that the Government's witnesses were liars, it was necessary to find that a United States Judge was a party to those lies.

Obviously, the Government's problem in this case was to make the jury believe that confessed perjurers were, in this instance, telling the truth. The United States Attorney attempted to solve this problem by telling the jurors in effect that they needn't decide if these people were lying, because the Government and a United States Judge had vouched for them. Their duty was reduced to a mere rubber-stamp of the implied prior findings of the Government and Federal Judge. Don't fret about these people who have been known to lie, the prosecutor argued, I believe them, the United States Government believes them, and a Judge believes them.

The Assistant United States Attorney reserved time for rebuttal after the defense summation. He used that time to re-emphasize and to remind the jury of his previous statements.

It must be emphasized, that such bolstering on rebuttal was particularly offensive in light of the fact that defense counsel expressly disclaimed any such innuendo, first suggested by the prosecutor, of a conspiracy among the Government and its witnesses (Appendix at 128-129a). Nevertheless, again the prosecutor argued that "if any one of you thinks that this Government and this Court participated with any of these people in a frame job...sit there and acquit him." (Appendix at 130a).

The meaning was clear. We believed them, so should you.

As was stated above, the cases in this Circuit and in other courts (People v. Ingram, __ A.D.2d___, 374 N.Y.S.2d 327 (1st Dept. 1975), arguing that an acquittal would be tantamount to a finding that the police officers were and hence would be guilty of perjury is a patently improper argument requiring reversal) indicates that this type of misconduct is not uncommon. The order of trial procedure has, however, dramatically neutralized the Government's plea of justification founded upon a defense counsel's rising to bait. The recent change in the order of procedure exposes this practice and most particularly, the conduct here, and shows a clear abuse of the prestige of the position of the prosecutor and the Court with a resultant denial of a fair trial to an accused.

No objection was taken to these comments of the prosecutor. Nor did the Court, sua sponte, correct the impression that the judicial system was vouching for the witnesses presented by the prosecution. The defendant is therefore forced to meet the test which requires for reversible error that such prosecutorial misconduct be "extremely inflammatory and prejudicial." United States v. De Alesandro, 361 F.2d 694 (2d Cir.), cert. denied, 385 U.S. 842 (1966). Surely, these remarks were both. In La Sorsa, supra, as an example of such inflammatory and prejudical conduct, this Court stated that should the Government suggest that the defense had made insinuations of prosecutorial misconduct that

the defense had not really made, such strategy would be prejudicially improper since such an argument would place the prosecutor's prestige behind its witnesses by denying such an alleged "frame-up." United States v. La Sorsa, supra, 480 F.2d at 526.

Such provocation or insinuations by the defense were not present herein; the defense had not yet summed up. Even if they were, the real reason for the strategy of the U.S. Attorney is more reprehensible than that alluded to in La Sorsa. It is clear that the U.S. Attorney called upon the institutions of the Government and the Court because he had no other means of supporting the testimony of his witnesses. He spoke at great length about "corroboration," but this so-called corroboration was at best, minimal. This strategy was employed so that witnesses unworthy of belief would be believed. It was unprovoked, and inflammatory, thus highly prejudical, calling for a reversal of the defendant's conviction.

b. The use of other acts

The portions of the summation discussed above were not the only instances of prosecutorial misconduct in this case. The Assistant United States Attorney misled and failed to follow the rulings of the Court with reference to the admissibility of evidence of other acts of the defendant. During the trial

of the co-defendants, testimony was introduced as to various nefarious deeds allegedly committed by these police officers. The trial in that case was based on a ten count indictment which included charges of conspiracy to obstruct Federal investigations into narcotics trafficking and conspiracy to deal in narcotics. This Court, on appeal from those convictions, stated that the evidence of other acts was admissible because "the charge of conspiracy to commit criminal acts always requires proof o a course of conduct that will circumstantially prove the corrupt agreement. There is no more convincing proof to a jury than that of a pattern of conduct which unfolds before their eyes." United States v. Papadakis, supra, 510 F.2d at 294-95.

Daly was not tried on the conspiracy counts, having been extradicted only on four substantive counts. The question of the admissibility of the other alleged acts was broached prior to the start of trial. Defense counsel asked if certain transactions testified to during the trials of Novoa and Eagan would be admissible in this trial. The Court stated that it would admit "anything that has to do with the selling, taking, receiving and so forth of narcotic drugs." As to the taking of money, "I think I am going to be cautious and exclude the sharing of money." (Appendix at 42a). Undaunted, the prosecutor stated in his very opening remarks to the jury:

> "This case involves the theft and distribution of enormous amounts of heroin and cocaine by corrupt police officers in the New York City Police Department. It involves the thefts of a large amount of money from narcotics offenders arrested by these officers. It involves the solicitation of substantial amounts of money from those narcotic offenders in order to sell out the case made on those offenders."
>
> (Emphasis supplied.)
> (Appendix at 43a).

The Judge had barely completed his ruling when the United States Attorney violated it and introduced extraneous and prejudicial matters into the case. The counts of the indictment being tried referred only to trafficking in narcotics. Reference to other alleged illegal activities(theft of money from drug dealers and extortion) began the prosecutor's purposeful attempt to try Peter Daly for all illegal acts allegedly committed by him when he was a police officer.

At the close of Court on the first day of trial, the Government requested a ruling from the Court on the admissability of evidence about an episode during which Daly effectuated an arrest in an airport and was supposed to have planted drugs on a suspect. (Appendix at 70-71a). The Court asked if the evidence showed possession by Daly of narcotics. The prosecutor replied

that "it shows evidence of possession of cocaine by Daly." (Appendix at 72a). The Court, obviously aware of the difference in meaning between direct evidence of possession and circumstantial evidence tending only to show evidence of possession, again asked if the Government was representing that the evidence establishes that Daly had possession. The Assistant U.S. Attorney replied that he had two witnesses ready to so testify, Aguilez and Stefania. Based on these representations, the Court stated it was inclined to admit the testimony, but reserved decision.

The next morning, the discussion again centered around the admissibility of this testimony. After ruling such evidence admissible, the Court stated it would strike the testimony if the evidence was shown to be not as represented by the Government. (Appendix at 73a). Through Aguilez, the Assistant U.S. Attorney brought out with reference to this airport incident that "Daly flaked the prospects" in order to justify the fact that he had confiscated approximately $122,000 from them. Defense counsel objected, and the U.S. Attorney was told that he could not introduce evidence regarding the taking of money (Appendix at 74a). Later in the trial, the prosecution called Stefania who also testified about this incident. The jury was treated to a scenario of an unrelated arrest at an airport by Daly, who had called Stefania to assist him in bringing the suspects back to New York, and in taking the $122,000 from them. After hearing the testimony, the Court was again forced to ask, "What is the

evidence that proves that Daly owned or had in his possession the narcotics?" (Appendix at 108a). In fact, there was none, and the Government knew this, but nevertheless represented to the Court repeatedly that this evidence did exist. The only purpose the prosecution could have had in introducing this extraneous evidence was to inform the jury that Daly had stolen money and shared it with other police officers. The Court attempted to protect the defendant from this prejudicial evidence, but owing to the misleading representations of the prosecutor, the jury was allowed to hear it.

All this testimony was stricken from the record (Appendix at 109a), but the damage had already and purposely been done.

Deliberate failure to abide by the instructions of the trial court as to the admissibility of evidence is prejudical error. United States v. Patterson, 495 F.2d 107 (D.C. Cir. 1974). Such error occurred here. Further evidence of the deliberateness of the prosecutor in attempting to elicit such improper testimony is seen--in addition to his statements in his opening, and his attempts to bring out to the jury the alleged incident of the theft of the $122,000 from the airport suspects--throughout the trial.

Although the Court initially indicated it would admit testimony, referring to alleged negotiations between the police officers and an attorney with a view to "selling out" the case against the four arrested persons, this evidence was later unequivocally ruled inadmissible. The Court decided that this evidence was "totally irrelevant" and saw absolutely no connection between the solicitation of a bribe and the selling of narcotics (Appendix at 100-101a). The only probative value of such evidence would be to show, according to the Court, that Daly was a bad person who took bribes. (Id.)

Thus, the U.S. Attorney was well aware that neither evidence of sharing money, nor evidence of soliciting bribes could be proffered to the jury in summation. Yet, he included in this argument to the jury the following:

> "They negotiated to sell out the case $150,000 to sell out that case law enforcement officers." ... (sic) (Appendix at 126-7a).

> "They had the audacity... to negotiate for money from the lawyers who represented those people and if you don't believe that and you want some corroboration, there are the court records of the attorneys who represented these defendants. Ask for them. The name is Santangelo, right on the bottom." (Appendix at 131-2a.

The prosecutor, anxious to convey to the jury that Daly was a bad person, deliberately disobeyed the rulings of the trial court, and the teachings of this Court in Papadakis in forcing into the deliberations of the jury extraneous matters for only one purpose--to show the jury that Daly was a bad person and to prejudice their deliberations.

Such trial tactics and strategy deprived defendant of a fair trial, based only on the charges in the Indictment.

IV. POINT II: DEFENDANT WAS DENIED DUE PROCESS OF LAW BY THE FAILURE TO ASCERTAIN WHETHER HE WAS COMPETENT TO STAND TRIAL.

The question of Daly's health arose on the very first day he appeared in Court. Defense counsel produced a letter and medical report dated March 30, 1975 from an English medical doctor detailing his diagnosis and recommendations for treatment of Daly. (Appendix at35a1-7). Defense counsel, the U.S. Attorney and the Court received copies, and were aware at that moment that Daly had suffered a head fracture in an accident, and that he was not fully recovered from the effects of that injury. Dr. Carter's diagnosis, on March 30, 1975, just six weeks prior to Daly's appearance before the trial court for the first time was, inter alia:

"1. Amnesia and certain organic mental defects...
2. Classical migraine...
3. Post head injury cerebrovascular insufficiency...". (Appendix at 35a).

The second incident which should have alerted counsel and the Court to the possibility of the defendant's lack of competency occurs during the cross-examination of Sheridan, the building superintendent. Obviously finished with his cross-examination, defense counsel stated he had one more question, "Did Mr. Daly sit down with you and your wife and have tea on one of those occasions?" Answer: No. Defense counsel then stated gratuitiously,"Those are the kind of questions I am asked to ask." (Appendix at 107a). Defense counsel was then aware or should have been aware, that Daly was not behaving or responding as he should. Daly, as a former detective, was a person well versed in courtroom procedure. Yet he was obviously not responding appropriately to the circumstances or to the proceedings.

Defense counsel should have asked for a competency hearing as soon as the behavior which prompted this unfortunate remark manifested itself. No such hearing was requested by defense counsel.

The next clue to the possibility of Daly's incompetency is found in the testimony of the British police officers. Daly, according to their testimony, had in his possession at the time of his

arrest an autobiography or resume detailing all of the important occurrences of his life (including reference to seizure of the narcotics which form the basis of the charges herein). (Appendix at 110a). This is but another clue to the fact that Daly may not have been competent. It is not normal to carry your autobiography around with you--unless, for some reason, you need to. If Daly was unable to remember his past, or had sporadic memory, such a document would be useful to him in keeping grasps on reality.

Later in the testimony of the English officer, the jury was told that when Daly appeared before the English magistrate, he asked for bail. The magistrate asked him what he would do if released on bail, and Daly casually replied that if released, he would return to Ireland (from where he could not be extradicted). (Appendix at 117a). Again, something appears to be wrong with Daly. An ex-police officer, who has been brought before a magistrate on an extradition hearing and is given an opportunity to have bail set, defeats his only chance of avoiding extradition by acknowledging that if released he would escape the jurisdiction of the court.

If the warning signs indicated above were the sum total of the evidence available on the record placing in question Daly's competence, the point might be unpersuasive. These episodes, however, have been highlighted so that the picture of Daly as gleaned from his testimony on the witness stand will be complete.

Daly was called to the stand in his own defense. Questioning had barely begun when his own attorney expressed annoyance with Daly's apparent inability to answer his questions. (Appendix at 119a). A bench conference was held at which the Assistant U.S. Attorney himself raised the question of the defendant's incompetency, saying that this issue should have been brought up before trial. The Court asked the prosecutor what should be done now? The tenor of the exchange reveals a belief that incompetency is a matter which can only be dealt with at a pre-trial hearing. It was therefore decided to continue, with an admonition to the witness to attempt to answer the questions. (Appendix at 120a).

Daly was entitled at that moment, if not earlier, to a hearing on his competency. The decision to continue the proceedings without affording him such a hearing, thus deprived him of due process. Congress has provided the proper answer to the Court's query "What is it you want me to do." (Appendix at 119a). "Whenever after arrest and prior to the imposition of sentence... the United States Attorney has reasonable cause to believe that a person charged...may be presently...so mentally incompetent as to be unable to...properly assist in his defense, he shall file a motion for a judicial determination of such mental competency." (Emphasis supplied). 18 U.S.C. §4244 . The United States Attorney

himself expressed doubts as to the competency of the defendant, yet he failed to request such a judicial determination.

The duty required by the statute is placed not only on the United States Attorney; defense counsel and the Court may also initiate incompetency proceedings. 18 U.S.C. §4244. Wherever the blame lies for not requesting such a competency hearing, error was committed. Conviction of a legally incompetent defendant violates due process. Pate v. Robinson 383 U.S. 375 (1966); United States v. Knohl, 379 F.2d 427 (2d Cir.), cert. denied, 389 U.S. 973 (1967). That defendant's behavior was such as to give rise to a question of his competency is seen from the record of defendant's actions and words and, more significantly, from the reaction of the United States Attorney.

Amnesia is not, of course, a complete defense to a charge, United States v. Sullivan 406 F.2d 180 (2d Cir. 1969), and the defendant is not now attempting to use amnesia as a shield against prosecution. A defendant's competency to stand trial is, however, an essential element in a fair trial. The evidence of the defendant's amnesia and his other inappropriate behavior certainly raised the question of whether he had "sufficient ability to consult with his lawyer with a reasonable degree of rational understanding." Dusky v. United States, 362 U.S. 402 (1960).

No one made any attempt to commence the statutory machinery to determine the defendant's capacity. This failure deprived defendant of due process and his conviction must be set aside as a result.

In Drope v. Missouri, 420 U.S. 162 (1975) the Supreme Court reversed a state court judgment of conviction on the ground that sufficient indicia had been shown placing the defendant's competency in question so as to require judicial determination thereof. The Court held that all surrounding circumstances should be considered, and that a trial court must always be alert to any circumstances suggesting incompetency. As in Drope, the facts as evident from this record created sufficient doubt of Daly's competence to stand trial to have demanded further inquiry on the question. No better proof of the existence of facts creating this doubt is available than defense counsel's and the Government's actual expressed concern during the trial about the defendant's competency. Yet nothing was done in the way of further inquiry on this question as required by Drope.

The extent of the prejudice to Daly of the failure to have ordered an examination and hearing relative to his competency, is particularly highlighted by a robing room conference during the trial.

Defense counsel after hearing the defendant testify stated that if he had known the extent of Daly's disability, they would have brought it to the Court's attention and requested a hearing thereon. (Appendix at 122a-123a). It was not too late, at that point, for defense counsel, the

Government, or for the Court to have moved for such a judicial determination of Daly's competency. Under the circumstances, the failure to have done so deprived Daly of his fundamental rights to due process of law.

V. POINT III: DEFENDANT WAS DEPRIVED A FAIR TRIAL BECAUSE OF INADEQUATE AND INEFFECTIVE REPRESENTATION.

Defendant was not defended by the attorney of his choice. An early mix-up in the trial precipitated by the United States Attorney, resulted in his counsel bringing in another attorney as trial counsel.

Deprivation of a fair trial on the grounds of inadequate and ineffective representation will be found when the representation is "so woefully inadequate as to shock the conscience of the court and make the proceedings a farce and mockery of justice." United States v. Yanishefsky, 500 F.2d 1327, 1333 (2 Cir. 1974); United States v. Currier, 405 F.2d 1039, 1043 (2d Cir.), cert. denied 395 U.S. 914 (1969). The accumulation of breaches of the attorney's duty to the defendant at the trial herein reach that level of malfeasance.

The Assistant U.S. Attorney moved to disqualify defendant's

chosen counsel because its star witness (Aguilez) claimed to have been previously represented by that attorney. The Court, after lengthy discussion among it, the U.S. Attorney, defense counsel and defendant, denied that motion. (Appendix at 37a-38a). Nevertheless, on the first day of trial, Scho field brought a trial counsel into the case purportedly to cross-examine Aguilez so that Scho field would not risk charges of professional misfeasance. From this point on, both attorneys showed greater concern for their own personal reputation than for the interests of their client.

The new trial counsel appeared on the morning of trial and announced that although he had only been brought into the case on the prior Wednesday, (trial beginning Monday) he felt he was familiar with the "background" of the case and would proceed to trial. (Appendix at 40a). The attorney failed to consider that his knowledge of the defendant might be, and should have been, important to a proper defense of the case. No adjournment was requested by either defense counsel, although Daly had been in the jurisdiction less than one month.

Mr. Scho field withdrew from active participation in the trial on the second day. He stated that he wanted to take the stand as a witness in this trial so that he might inform the jury that he was not on retainer to Daly, a fact testified to by

Aguilez. (Appendix at 82a-83a). The Court indicated that it did not see any reason for Schofield to discontinue his services to Daly, and that, in any case, he thought the testimony Schofield wanted to give was irrelevant. As an alternative to Schofield discontinuing his representation of Daly, the Court offered to give a jury instruction to cure "any opprobrium... from you." (Appendix at 84a). Schofield was obviously quite disturbed by this incident and, in fact, did not cross-examine any other witness with a view toward his tesifying.

The significance of this episode is again in the lack of consideration given to the client resulting from an attorney's overriding desire to make a good showing of himself. Although this exchange took place out of the jury's hearing, it shows a professional and psychological disassociation from the defendant and his cause. So worried about his own reputation and appearance, defense counsel sacrificed his client's best interests by relinquishing the conduct of the trial to an attorney who was unprepared for the case.

Herwitz committed a more aggrevious injustice to Daly by disassociating himself from the client in front of the jury. The statement of Herwitz's, discussed previously with reference to Daly's incompetence, that "these are the kinds of questions

I am asked to ask," was made in open court. The American Bar Association Code of Professional Responsibility cautions that an attorney shall not "prejudice or damage his client during the course of the professional relationship" DR 7-101(A)(3). Certainly within the proscription of this rule is a statement by an attorney before the triers of facts manifesting a disbelief in and disapproval of one's client. The right to counsel is meaningless if that counsel is allowed to convey to the jury his displeasure with his client, the defendant.

The inadequacy of representation of the defendant culminated in his being placed on the witness stand. His attorney stated that this decision was made because the Court had admitted evidence of the"airport case," which, in fact, had been stricken from the record. (Appendix at 121a). The attorney placed Daly on the witness stand without ever having ascertained his ability to testify. Further, lacking knowledge of his ability to testify, the attorney was unable to make an intelligent decision as to the wisdom of introducing this testimony. As previously noted, Daly was a stranger to trial counsel (supra at 26). Rather than take the time and effort to prepare this case, trial counsel relied on his knowledge of the case gleaned from the Papadakis trial transcript, and his former representation of Lieutenant Egan.

Assuming a competency hearing had been held, and Daly found to be competent, placing a person on the stand who is obviously unable to present himself in an acceptable manner within the confines of courtroom testimony is certainly inadequate representation.

Herwitz failed to hide his displeasure with his client from the jury during Daly's testimony. Daly was chided by Herwitz for not answering the questions. (Appendix at 119a). One would have thought that Herwitz was cross-examining a hostile witness.

Daly's testimony was basically that he could not remember whether or not the things testified to by the Government's witnesses actually occurred. At the end of his testimony, defense counsel apologized to the Court for having put the defendant on the witness stand, claiming lack of knowledge as to the extent of his memory failure. (Appendix at 122a). One would hope he extended his apologies to the defendant, also, for failing to protect his due process rights. The purpose of Herwitz's apology to the Judge was to protect his and Mr. Schofield's professional reputation. (Id.) The attorneys seem to have forgotten that they were not on trial, Daly was.

Quite possibly, the most startling evidence of inadequate and ineffective representation by counsel can be found in the colloquy that took place in the trial judge's robing room after Daly's testimony. Defense counsel readily admitted to the Court his shocking lack of preparation of and consideration for his client's interests in presenting his most important evidence, the testimony of the defendant himself, without the slightest preparation therefor and in a cavalier disregard of the consequences thereof. (Appendix at 122-3a).

VI CONCLUSION

For the reasons stated above, considered singly or for their cumulative effect, the defendant Peter Daly was denied a fair trial. The judgment of conviction, should, accordingly, be vacated and the proceedings remanded for a new trial.

Respectfully submitted,

IRA LEITEL, ESQ.

Attorney for Defendant-
Appellant Peter Daly

COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
~~Respondent~~
Plaintiff- Appellee,

- against -

PETER DALY,
Defendant- Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the **18th** *day of* **May** *19* **76** *at* **One St. Andrews Plaza, New York New York**

deponent served the annexed **Appendix** *upon*

Robert B. Fiske Jr. Us. Attorney for the Southern District

the **Attorney** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

Sworn to before me, this **19th**
day of **May** *19* **76**

Reuben Shearer

Reuben Shearer

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977